

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

[Entitlement to]

FILE: B-196946

DATE: November 19, 1980

MATTER OF: Basic allowance for quarters while member
is in confinement

DIGEST: Basic allowance for quarters (BAQ) is not authorized when a member, without dependents, is convicted by court-martial, which does not direct forfeiture of allowances, and the member is sentenced to confinement in a guardhouse, brig, correctional barracks or Federal penal institution, regardless of whether the member was receiving BAQ prior to confinement or his assigned quarters were terminated, provided the sentence is not overturned or set aside. 40 Comp. Gen. 169 (1960) and 40 Comp. Gen. 715 (1961) distinguished.

The Assistant Secretary of Defense, Comptroller, requests a decision on whether members without dependents, confined to a guardhouse, brig, correctional barracks, or Federal penal institution, pursuant to a court-martial which does not direct forfeiture of allowances, is entitled to basic allowance for quarters (BAQ) during confinement.) The circumstances are discussed and set forth in Committee Action No. 547 of the Military Pay and Allowance Committee, Department of Defense.

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AGC 00547

The questions presented are as follows:

a. (A member, without dependents, is convicted by court-martial and sentenced to 2 years confinement. The United States Disciplinary Barracks (USDB) Fort Leavenworth, Kansas, is designated as the place of confinement. The member will not be returned to a duty status upon completion of the period of confinement.) If this member was assigned to adequate Government quarters at the old duty station and that assignment was terminated upon transfer to the USDB, would he be entitled to BAQ for the period of confinement? Would the answer be the same if the member was in receipt of BAQ at the old duty station?

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Advises:

*Authorization for Basic Allowance
for Quarters of Military Member in
Confinement*

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b. A member, without dependents, is convicted by court-martial and sentenced to 2 years confinement. The guardhouse or brig at the member's permanent duty station is designated as the place of confinement. The member will not be returned to a duty status upon completion of the period of confinement. If this member was assigned to adequate Government quarters before being confined, and the assignment to quarters was terminated because the member was not to be returned to duty, would he be entitled to BAQ during the period of confinement? Would the answer be the same if the member was in receipt of BAQ before the period of confinement?

✓ Title 37, United States Code, section 403(b), provides that " * * * a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank or rating and adequate for himself * * * is not entitled to a basic allowance for quarters * * * ." (Basic allowance for quarters is not part of the pay of a member but is rather an allowance which is payable when adequate Government quarters are not furnished, and BAQ is not an amount of a member's naturally due compensation which he forfeits when quarters are furnished but is rather an allowance which is authorized when quarters are not so furnished.) This rationale was expressed by the Court of Claims in Byrne v. United States, 87 Ct. Cl. 241, 248 (1938):

" * * * Commutation is for the purpose of compensating an officer for expenses incurred in providing private quarters for himself and his dependents when the Government fails to provide public quarters. On this theory only can recovery be had and, as it appears in this case that the officer has not been put to any expense, no right to reimbursement has been established."

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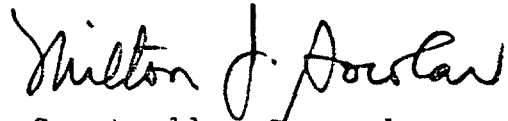
The theory behind BAQ is reimbursement for something paid out. Byrne, supra. Once confined the member has no out-of-pocket expenses for quarters and thus has no basis for receiving BAQ. By analogy, under circumstances where a member of the armed services has been hospitalized in a Government hospital without being put to any expense to provide quarters for himself, our decisions have held that he was furnished the equivalent of quarters in kind. This has been grounded on the theory that during such hospitalization he is furnished all the quarters he can use and that we would not be warranted in construing the law so as to authorize the payment of BAQ. ✓ See B-130107, February 7, 1957, and cases cited therein. The same is true for confinement. The member is not being put to any expense to provide quarters for himself, and in accordance with his conduct he has been furnished the equivalent of quarters in kind; he is furnished all the quarters he can use for the duration of his confinement. Thus, there is no basis for paying BAQ regardless of whether the member was in receipt of BAQ prior to confinement or was assigned to adequate quarters which were terminated.)

(The fact that we have held that there is entitlement to BAQ for periods when a member is confined if the charges are later withdrawn, the court-martial results in an acquittal, or if there is a conviction and the sentence is later set aside or disapproved is not considered controlling in the circumstances here in question. If confinement is disapproved after it was enforced we held that BAQ should be paid because the quarters ordinarily provided for confinement in a guardhouse, brig, disciplinary barracks, etc., may not properly be regarded as adequate quarters assigned to a member appropriate to his rank, etc. ✓ 40 Comp. Gen. 169, 171 (1960). See also 40 Comp. Gen. 715 (1961). (Freedom of use and of ingress and egress were basic considerations in this matter.) ✓ 40 Comp. Gen. at 172.

That rule is predicated upon the retroactive disapproval of confinement. It results in part from the requirement that the individual be restored all rights and privileges to individuals whose confinement is not approved after it has taken place. (However, a member whose conduct

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results in conviction by court-martial with a sentence to confinement and the conviction is not later overturned or set aside, is in a different situation. That is, he is placed in such quarters as the proper result of his conduct, and under these circumstances those quarters are appropriate and adequate. The curtailment of the freedom to come and go at will is also a consequence of the member's own conduct and in such circumstances has no bearing on BAQ. Accordingly, the fact that BAQ is allowed when a period of confinement is retroactively disapproved provides no basis for holding that BAQ should be paid to those who are confined and whose sentences to confinement are not later altered.)

A handwritten signature in dark ink, reading "Milton J. Douglas". The signature is written in a cursive style with a large, prominent "M" and "D".

For the Comptroller General
of the United States